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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1969

No. 1195

CARL HOCKER, WARDEN, NEVADA STATE PRISON,
Petitioner,

vs.

JAMES A. HEFFLEY, *Respondent.*

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

and

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada 89701

Attorney for Petitioner

IN THE

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COMES NOW petitioner above named, and respectfully moves this Court for leave to file the annexed petition for certiorari under the provisions of section 1651 of Title 28 USCA, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review a decision of said Circuit Court reversing a judgment of the United States District Court for the District of Nevada denying a petition for a writ of habeas corpus filed by and on behalf of respondent, above named, which judgment was duly given and made on the 12th day of February, 1968.

The decision of said Circuit Court of Appeals was duly given and made on December 9th, 1969. A copy of said decision of said Circuit Court of Appeals, is more particularly described in the petition for certiorari filed herewith and a copy thereof is attached to said petition as Appendix "A".

WHEREFORE, petitioner prays for an order granting the right to file said petition for certiorari, and for such other and further relief as to the Court may be just and proper.

DATED this 30th day of January, 1970.

HARVEY DICKERSON
Attorney General of Nevada
Attorney for Petitioner

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No.....

CARL HOCKER, WARDEN, NEVADA STATE PRISON,
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vs.

JAMES A. HEFFLEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Carl Hocker, Warden, Nevada State Prison, petitioner herein, prays that a writ of certiorari issue to review a decison of said Circuit Court, which decision reversed a judgment and order duly given and made by the United States District Court for the District of Nevada on the 12th day of February, 1968, denying a petition for habeas corpus filed by and on behalf of respondent above named.

The decision of said Circuit Court of Appeals was dated the

9th day of December, 1969; but, said decision was not received by your petitioner until December 19th, 1969, and your petitioner did not learn of said decision until said 19th day of December, 1969.

CITATION OF DECISION SOUGHT TO BE REVIEWED

The decision of the Ninth Circuit Court of Appeals which is sought to be reviewed is, as yet, unreported, but is numbered 22,661 therein, and is dated, as aforesaid, December 9, 1969; a copy of said decision is printed in Appendix "A" hereto, infra, beginning page 23.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1651 of Title 28 USCA and Section 1254(1) of Title 28 USCA.

QUESTIONS PRESENTED

1. Whether the search of respondent's automobile by the police at the police station was unreasonable and illegal after the arrest of respondent in heavy traffic on a three-lane one-way street where a number of cars were backed up behind the scene of arrest and were forced around respondent's car and police vehicle in order to resume travel;

2. Whether the arrest and subsequent search by the police of respondent's automobile at the police station without an arrest or search warrant was illegal and unreasonable after police, upon stopping respondent's car on a heavily-traveled public street, observed through the car windows in bulk and lying in plain view in the rear portion of the car the following items:

"Six shotguns, two rifles, two pistols, four cameras, field

glasses, a timing light and various papers. Most of the articles seized were in plain view in the rear portion of the sedan, and the evidentiary items (hereafter described and discussed under Statement of the Case) essential to the Nevada prosecution were there found, although *they may have been covered or obscured by the guns* and other paraphernalia."

Quotation taken from dissenting opinion in said Circuit Court of Appeals for the Ninth Circuit decision, page 10 thereof; and from the "record" at 137 cited by the dissenting justice.

STATEMENT OF THE CASE

As taken from the Nevada Supreme Court's opinion in *Heffley vs. State*, Case No. 5115, 83 Nev. 100, 423 P.2d 666 (1967), the basic facts of this case, pertaining to the search and seizure, are as follows:

"On October 25, 1965, the residence of Eccles and Chester was burglarized in Washoe County. Among the items stolen were Eccles' passport, Chester's passport, a trailer registration, and a truck title. No identity of the culprit was established at that time.

"Heffley was arrested in his automobile in Sacramento, California, on November 13, 1965, while he was waiting for a stop light. Officer Santich, the arresting officer, had received a radio report that a person driving a car answering the description of that of Heffley was attempting to sell guns to pawnshops and he was ordered to investigate. Santich approached Heffley at the stop light and while interrogating him saw the butt of a pistol under the driver's seat. He also observed several shotguns, rifles, and pistols piled on the rear seat. He ordered Heffley out of the car, arrested him for possession of the pistol, took the pistol from the car, and then had Heffley taken to jail in another police car which had

been summoned by Santich. Santich drove Heffley's car to the same police station three blocks away.

"A complete search of the entire automobile was immediately made at the station by officer Santich. He looked into the trunk and under the hood, although no unusual articles were found in those places. On the floor by the rear seat he found the two passports and the two certificates of registration along with, of course, the arsenal of guns. He made a list of the items he found in the automobile."

REASONS FOR GRANTING WRIT

One very persuasive reason for the granting of the writ in this case is that the Sacramento, California police were actually searching for the respondent, having been alerted by a radio report that a person driving a car answering the description of that of Heffley was attempting to sell guns to pawnshops, and the arresting officer, Santich, was ordered to investigate.

Santich observed the described car stopped at a stop light. The officer approached Heffley at the stop light and while questioning him saw the butt of a pistol protruding from under the driver's seat and a veritable arsenal of shotguns, rifles and pistols lying on the rear seat of Heffley's car.

Heffley was ordered from the car, and arrested for possession of the pistol. The officer took the pistol and "within three minutes" had Heffley taken to jail in another police car which he had summoned. Officer Santich then drove Heffley's car to the same police station three blocks away, and listed the car's contents on an inventory prior to having the car stored in a public garage.

In addition to the arsenal of guns, already mentioned, the officer found two passports and two certificates of motor vehicle registration, all of which was listed on an inventory. All of these documents had been stolen during a burglary of a Washoe

County, Nevada residence for which Heffley was subsequently convicted.

The Circuit Court of Appeals for the Ninth Circuit in its opinion (No. 22,661, titled *James A. Heffley vs. Carl Hocker, Warden*) page 4, said:

> "In our case the officer saw, from a point outside the car, weapons on the back seat of the car. The removal of the guns would probably have revealed the documents in question without the need of a further search *or possibly, as the district court thought likely, the documents might themselves have been visible from the outside.*" (Emphasis added.)

Then the court stated, with which statement we respectfully disagree:

> "But the officer still could not enter the unoccupied car after it reached the police garage, without a warrant to search and seize, except for some other appropriate reason as in *Harris. (Harris vs. United States, 390 U.S. 234.)* In *Harris* the officer's presence in the car was lawful—he was engaged in protecting the car by rolling up the windows and locking the doors. In our case, the officer's presence in the car was not lawful, for he was engaged in a seizure, if not a search, without a warrant. The 'narrow circumstances' of *Harris* are not present here."

We respectfully contend that the officer's presence in the car in the instant case was much more lawful than in *Harris*, for, in *Harris*, as the Circuit Court stated, the officer, "was engaged in protecting the car by rolling up the windows and locking the doors." Whereas, in our case the officer entered Heffley's car after the arrest, on a busy street, in order to drive it to the police station, there to remove and inventory the car's contents, and store them for safekeeping prior to sending the car to a public

garage for storage. How, then, we ask, can it be properly said that the officer's presence in the car was not lawful? Everything the officer did in removing the car from the public street to the police garage and inventorying its contents and storing them before having the car removed to the public garage for storage was to protect the accused's property, more so than the police action in *Harris*, supra.

In this connection, we respectfully submit that every act of the officer in this case was reasonable and under no proper consideration of the police action was the search or seizure unreasonable. Furthermore, it should be noted that when confronted with the documents, Heffley confessed the burglary for which he was convicted.

In the district court opinion denying habeas corpus, the court said that it, ". . . thought likely the documents might themselves have been visible from the outside."

However, as stated in the Circuit Court opinion:

> "But the district court did not rely solely on the possibility that the documents were visible. That court's primary reason for denying the habeas application was that where, as here, the accused was arrested in his automobile in a traffic lane on a public street, a search of the vehicle made immediately after removal of the car to a nearby police station should be considered incident to and substantially contemporaneous with the arrest, and therefore reasonable under the Fourth Amendment.
>
> "The majority of the courts of appeals that have dealt with the problem support this view. See Price v. United States, 348 F.2d 68 (D.C.Cir. 1965); United States v. Dento, 382 F.2d 361, 365–366 (3rd Cir. 1967); United States v. Powell, 407 F.2d 582, 585 (4th Cir. 1969); United States v. Evans, 385 F.2d 824, 825 (7th Cir. 1967). Contra: Barnett v. United States, 384 F.2d 848, 860–861 (5th Cir.

1967); Colosimo v. Perini, ... F.2d ....., (6th Cir. 1969)."

It is also to be noted that in the *Harris* case, supra, this court stated:

> "Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrowing circumstances.
>
> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It had long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Ker v. California, 374 U.S. 23, 42, 43 (1963); United States v. Lee, 274 U.S. 559 (1927); Hester v. United States, 265 U.S. 57 (1924)."

This quotation from *Harris*, supra, is quoted by the Circuit Court on page 4 of its opinion.

In concluding this point or reason for granting the writ, we respectfully submit that *Preston vs. United States*, 376 U.S. 364 (1964), which the Circuit Court considered controlling, is not applicable to the instant case. For, in *Preston*, supra, all that alerted the police was the presence of "suspicious" persons seated in an automobile on a public street with no suspicious objects visible from the outside.

This is a far cry from the instant case in which, pursuant to a police radio report that the accused in a described car had made several attempts to sell numerous weapons, and in which, pursuant to specific instructions, Officer Santich arrested the accused on a busy public street and observed a veritable arsenal of guns on the rear seat of the car and a pistol under the front seat; and in which also there is no competent evidence that the documents objected to were not visible from outside the car.

Further discussing *Preston*, supra, there, the police responded to a telephone call at 3:00 o'clock a.m. that three "suspicious characters" were parked in a business district for several hours. Upon arriving at the scene, police questioned the three men, who were unable to give satisfactory answers for their being there at that hour. The four officers arrested the three men for vagrancy and searched their persons. They did not search the car at the scene of the arrest. The car was driven to the police station by an officer. The men were booked. The car was towed to a garage. After booking, the officers went to the garage to search the car. They found two revolvers in the glove compartment. They could not open the trunk, but at the police station a detective told the officers to go back and try again. Upon entering the trunk through the back seat of the car, they found items including a phony snap-on license plate, and mask fashioned from women's stockings. The admission of these items at the trial led to a reversal of the conviction by the Supreme Court.

The facts of this case have been set out in detail because of the necessity of distinguishing this case from *Preston*, supra.

The district court stated the rule that a search without a warrant is permissible, provided it is incidental to a lawful arrest. That is, the search must be contemporaneous with the arrest, or not too remote in time or place to be valid.

The doctrine of *Preston*, supra, was reiterated after a fashion in *Cooper vs. California*, 386 U.S. 58, 17 L.Ed.2d 730 (1967). In remarking on the *Preston*, supra, decision, the court reminded us that unreasonable searches and seizures depend on the facts and circumstances of each case (at page 732):

Of necessity, the present case must be factually distinguished from *Preston*, supra. We submit that the factual differences are so significant that the respondent is not entitled to the protection of its ruling.

In *Preston*, supra, the officers had no grounds for arrest, except that the three suspects were "suspicious looking" and could not give a reasonable account for sitting in their car at 3:00 a.m. Officer Santich knew that Heffley (by reason of the description given him) was trying to pawn a large number of guns. He observed a large number of guns in Heffley's car. He also saw a partially concealed pistol under the front seat.

In this case, all items were found in the back seat of Heffley's car, and, although partially covered, must have been visible. In *Preston*, the pistols were in the glove compartment and the bulk of evidence was in the trunk. To reach them required the removal of the back seat.

Officer Santich immediately drove Heffley's car to the police station three blocks away and completed his search. This could not have taken more than a few minutes. In *Preston*, no time is reported. It is obvious, however, that considerably more time elapsed in *Preston*. The police first drove the car to the police station. They then drove it to a garage. The suspects were booked. After this occurred, an attempt was made by some officers to search the car. They couldn't open the trunk, but did obtain two pistols from the glove compartment. They returned to the station. They were instructed to go try again. Finally, they broke into the trunk through the back seat and only then found the bulk of the evidence. This must have taken time. Thus, the time element is different. So is the place. We do not know the distances involved in *Preston*, supra. But the search was conducted not at the police station but rather at a garage. Here Santich immediately drove three short blocks to the police station and conducted the search himself. It is not known if this is the case in *Preston*.

In *Preston*, the suspects were booked before the search. In this case Heffley was not.

In *Preston*, the events occurred around 3:00 a.m. In this case,

they occurred after 10:00 a.m. and before 4:00 p.m. In Heffley, Officer Santich was confronted with a suspect having at least one partially concealed weapon in his car and an arsenal in the back seat. It seems reasonable to remove a car from the street and a man in possession of concealed weapons in the interests of safety.

CONFLICTING CIRCUIT COURT DECISIONS

In *United States vs. Evans*, 385 F.2d 824 (7th Cir. 1967), defendant was convicted of a narcotics violation. He was arrested as he was entering his automobile. A search of his person was made, and the agents started to search his automobile, when they noticed a number of people gathering near them. They decided it was advisable to move. Defendant was then placed in an agent's car, and one of the agents drove defendant's car to the basement of the Chicago Federal Building, the trip "consuming fifteen or twenty minutes."

The agents there searched Evans' automobile and discovered some narcotics which Evans denied owning. The narcotics were seized and used as evidence, and defendant was convicted.

A motion to suppress was denied, although the defendant relied on the rule of *Preston*, supra. The Circuit Court judge in the *Evans*' opinion quoted from *United States ex rel. Montgomery vs. Wallack*, 255 F.Supp. 566, 569 (S.D.N.Y. 1966) as follows:

"We need no current reminder that arrests in a crowded, substandard neighborhood oftimes triggers explosive action . . ."

In answer to the defendant's reliance on *Preston*, supra, the court said:

> "More applicable to the case at bar is the statement in Cooper v. State of California, 386 U.S. 58, 61, 87 S.Ct.

788, 791, 17 L.Ed.2d 730 (1967). . . . This case is neither Preston nor controlled by it. . . ."

The court then concluded the point by stating:

"Defendant overlooks the basic rule of Preston and Cooper. The Fourth Amendment test is whether the search was reasonable. We hold that under the circumstances of this case, the search of defendant's automobile conducted in the presence of the defendant, was a reasonable search."

This holding is in direct conflict with the statement in Heffley that:

"The circumstances that the search was conducted shortly after the arrest, and that it was impracticable to search the automobile on the street, are immaterial."

We respectfully submit that the search in the instant case, even in the absence of respondent, was as contemporaneous as was reasonably possible, bearing in mind that the arrest of respondent was made at a traffic light on a busy street.

We also respectfully submit that under all the circumstances of this case, the absence of a search warrant did not render this search unreasonable in view of the wording of the Fourth Amendment.

See also *United States vs. Dento*, 382 F.2d 361 (3rd Cir. 1967), in which it was held that after defendant's arrest on a busy highway, "for reasons of safety there was no search made of defendant's car while it was parked along Route 22." (The place of arrest.)

Instead, defendant's car was driven to the State Police Barracks at Clinton, N. J., where a search revealed counterfeit notes. After defendant's conviction, defendant contended that the evidence thus seized and introduced in evidence was in violation of

his constitutional rights. The court said that the contention "rested on two fundamental points: The necessity of a warrant for both the arrest and search, and the legality of the arrest and incidental search without a warrant."

The Third Circuit Court of Appeals in its opinion affirming the conviction, stated at page 365 that:

> "Clearly from the facts, the search of Dento's automobile was substantially contemporaneous with his arrest." (Citing Stoner v. California, 376 U.S. 483.)

The court then continued:

> "Although the place of the search was remote from that of the arrest, the safety of the officers and defendant required that the vehicles be moved away from the flow of highway traffic. This is not a situation where the police take the car to the station in order to conduct a fishing expedition for evidence. Before the arrest was made troopers Decker and Cole had every reason to suspect that the defendant was hiding something in connection with his alleged offense since, when they motioned Dento's car to the side of the road, both officers noticed him lean forward and apparently put something under the front seat. Once defendant's car was removed to the safety of the Clinton barracks the police immediately began the search which uncovered the counterfeit money.
>
> "Under the facts before us Preston v. United States, supra, does not control and we are satisfied that the search before us was reasonable. There are two basic points of departure separating the Preston decision from this appeal. First, unlike Preston the instant search was substantially contemporaneous with the arrest (the entire arrest and search procedure was completed within twenty minutes). Secondly, there was a reasonable nexus between the offense the defendant was arrested for and the search of his automobile, where as in

Preston the search was entirely unrelated to the arrest on the charge of vagrancy. In distinguishing Preston we do not overlook the statement made by the Supreme Court that '[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' 376 U.S. 364 at 367, 84 S.Ct. 881 at 883. However, no situations are identical and a judicial examination into the reasonableness of a search depends a great deal upon the facts and circumstances of the individual case. Cf. United States ex rel. Murphy v. State of New Jersey, 260 F.Supp. 987 (D.N.J. 1965), aff'd, 369 F.2d 698 (3 Cir. 1966), cert. denied, 386 U.S. 965, 87 S.Ct. 1044, 18 L.Ed.2d 114 (1967). Explaining Preston, the Supreme Court stated in Cooper v. State of California, 386 U.S. 58, 59, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967):

"We made it clear in Preston that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property."

Please see also the following relevant cases:

Arwine v. Bannan, 346 F.2d 458 (1965); *Price v. U.S.*, 348 F.2d 68 (1965); *Johnson v. State*, 238 Md. 528; 209 A.2d 765 (1965); *Trotter v. Stephens*, 241 F.Supp. 33 (1965); *People v. Durgas*, 51 Cal.Rptr. 178 (1966); *People v. Talbot*, 51 Cal.Rptr. 417 (1966); *U.S. v. Wallack*, 255 F.Supp. 566 (1966); *Knotts v. State*, 237 Md. 417; 207 A.2d 100 (1965); *People v. Moschelta*, 25 App.Div.2d 686; 269 N.Y.S.2d 70 (1966); *Fraker v. U.S.*, 294 F.2d 859.

These cases all have one thing in common, there was some delay between the actual arrest and the completion of the search. Further, the search was often not completed at the actual place of the arrest.

In each federal case, certiorari was denied. Perhaps the best authority Respondent can cite comes in *Cooper vs. California*, 386 U.S. 58, 17 L.Ed.2d 730 (1967), where the dissent said:

> "I can see only two ways to explain the court's opinion. One is that it overrules Preston sub silentio."

We submit the court in *Preston* meant something more than mere inconsequential deviation in space and time is required to render a search and seizure invalid on the basis it was not incidental to a lawful arrest.

CONCLUSION

The incriminating evidence introduced at the trial court, and upon which these proceedings are based, were found on the floor of the petitioner's automobile (TR 29–30). While the incriminating evidence may have been partially covered or obscured by the guns piled in the rear of the automobile, they were nevertheless in plain view.

Petitioner was arrested on a concealed weapons charge under California law, which provides:

> ". . . any person who carries concealed . . . within any vehicle which is under his control or direction any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm as

> provided in this chapter is guilty of a misdemeanor, and if he has been convicted previously of any felony or of any crime made punishable by this chapter, is guilty of a felony."

Thus, the car was an integral element of the charge and the police had it in lawful custody. Furthermore, the arresting officers had the duty to remove the automobile from the traffic lane of a public street and to safeguard its contents after the arrest. They were, therefore, lawfully inside the automobile. Under these circumstances, the items found in the automobile were not the product of a search, but were subject to seizure and were lawfully introduced into evidence.

In the *Harris* case, supra, the police impounded an automobile as evidence. A search was conducted more than an hour after the accused had been brought to the police station. The incriminating evidence was an automobile registration showing the name of the owner of the automobile. The court said:

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Ker v. California, 374 U.S. 23, 42–43, 10 L.ed.2d 726, 743, 83 S.Ct. 1623 (1963); United States v. Lee, 274 U.S. 559, 71 L.ed. 1202, 47 S.Ct. 746 (1927); Hester v. United States, 265 U.S. 57, 68 L.ed. 898, 44 S.Ct. 445 (1924)." (See also *Miller v. U.S.*, 356 F.2d 63 (1966).)

Because the objects were in plain view, and because the officers had a right to be in the automobile, no search occurred, and the incriminating evidence was lawfully admitted by the trial court.

For the foregoing cogent reasons, we respectfully urge that this petition for a writ of certiorari be granted.

DATED this 30th day of January, 1970.

HARVEY DICKERSON
Attorney General of Nevada
Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,661

JAMES A. HEFFLEY, *Appellant*, vs. CARL HOCKER, WARDEN, NEVADA STATE PRISON, *Appellee*.

[December 9, 1969]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Before: HAMLEY and MERRILL, Circuit Judges, and POWELL, District Judge*

HAMLEY, Circuit Judge:

James Alvin Heffley, serving a life sentence in Nevada State Penitentiary, appeals from an order denying his application for a writ of habeas corpus.

Heffley's incarceration is pursuant to a burglary conviction and a subsequent habitual criminal conviction obtained in 1966. The burglary conviction was upheld on appeal on March 20, 1967, one justice dissenting. *Heffley v. State*, 83 Nev. ....., 423 P.2d 666 (1967).

Heffley alleged in his application for a writ that he was deprived of his Fourth Amendment rights because documents seized during an illegal search of his automobile were received in evidence against him at his state burglary trial.

The facts pertaining to the seizure of these documents are not in dispute. On November 13, 1965, Officer George Santich of the Sacramento, California police department, received an order to investigate a report that a person driving a 1957 blue and white Buick with license number LUS 507 was trying to sell some guns. Sometime thereafter Santich saw this automobile being driven along a Sacramento street. Santich drove along behind the Buick until it stopped for a traffic light. He then got out of the police car and approached the other car. As he did so he observed a large quantity of guns, partially covered up, on the back seat of that vehicle.

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*The Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

Santich asked the driver of the Buick, Heffley, for his identification and driver's license. As Heffley was in the process of getting his wallet, Santich observed the butt end of a gun protruding from under the seat where Heffley was sitting. He then asked Heffley to get out of the car, and placed him under arrest for possession of the gun. Santich did not have a warrant for Heffley's arrest. The officer called for another squad car to take Heffley to police headquarters. Santich then drove Heffley's car about three blocks to the same police station.

Although Officer Santich looked over the guns in the back seat of the Buick when he arrested Heffley, he made no exploratory search of the car at that time. Heffley was removed to the police station within three minutes after the arrest. Santich placed the Buick in a private stall at the police station and, without a search warrant, immediately searched "the whole car, the trunk, back seat, under the hood, wheels, and everything." Heffley was in police custody in another part of the police station at that time. After the search was completed, the car was taken to a private garage and impounded.

In the course of his search, Santich found the documents in question on the rear floor of the Buick. He had not seen them before conducting this search. The documents consisted of two passports, a certificate of registration for a two-wheel trailer, and a certificate of ownership for a one-half ton pickup. All of these papers had been stolen during the burglary for which Heffley was convicted. They were received in evidence over the objection of Heffley's counsel that they were obtained as a result of an illegal search and seizure.[1]

The district court questioned whether there was a search at all, under these facts, pointing out that most of the articles seized were in plain view in the rear portion of the sedan. The court conceded, however, that the documents here in question may have been covered or obscured by the guns and other paraphernalia.

In all probability, the documents were not visible from outside the automobile, since Officer Santich testified that he had not seen them before conducting the search. In any event, if it be assumed that the documents were plainly visible so that no search was required, that alone would not validate the *seizure* of the documents without first

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[1] Heffley's trial counsel did not make a particularly forceful objection to the introduction of these documents. However, any problems of waiver were cured by the Supreme Court of Nevada's consideration of the search and seizure question on the merits. See *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 297, n. 3; *Curry v. Wilson*, 405 F.2d 110, 112 (9th Cir. 1968).

obtaining a search warrant. Article IV proscribes unreasonable *seizures* as well as unreasonable searches. See *Pendleton v. Nelson*, 404 F.2d 1074 (9th Cir 1958).[2]

The facts of this case are distinguishable from those of *Harris v. United States*, 390 U.S. 234 (1968), in which a police seizure of a registration card found in an impounded automobile was upheld. While there was a police search of the Harris automobile, the court stated that the registration card was not discovered or seized while the police were conducting the search.

The impounded car was being held in a place open to the weather and it had begun to rain. The windows of the car were rolled down and the doors were unlocked. The officer opened the front door on the passenger side "in order to secure the window and door." As he did so he saw the registration card lying face up on the metal stripping over which the door closed. The Supreme Court held that since the officer had a right to open the door in his effort to protect the vehicle, he had a right to seize the card which was then plainly visible and could be obtained without an unauthorized entry. The Court made it clear that, with regard to the registration card, no entry into the vehicle for the purpose of search, or even for the purpose of seizing a card visible from the outside, was involved. It was in this context that the *Harris* Court said:

> "Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.
>
> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It had long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker v. California*, 374 U.S. 23, 42–43 (1963); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924)."

In our case the officer saw, from a point outside the car, weapons on the back seat of the car. The removal of the guns would probably have revealed the documents in question without the need of a further search or possibly, as the district court thought likely, the documents might themselves have been visible from the outside. But the officer

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[2] We there stated:

> "The view of the [evidence] through the window may have provided probable cause to obtain a search warrant but, since no exigent circumstances were shown to exist, such view did not authorize a seizure without such a warrant or consent." 404 F.2d at 1077.

still could not enter the unoccupied car after it reached the police garage without a warrant to search and seize, except for some other appropriate reason as in *Harris*. In *Harris* the officer's presence in the car was lawful—he was engaged in protecting the car by rolling up the windows and locking the doors. In our case, the officer's presence in the car was not lawful, for he was engaged in a seizure, if not a search, without a warrant. The "narrow circumstances" of *Harris* are not present here.

But the district court did not rely solely on the possibility that the documents were visible. That court's primary reason for denying the habeas application was that where, as here, the accused was arrested in his automobile in a traffic lane on a public street, a search of the vehicle made immediately after removal of the car to a nearby police station should be considered incident to and substantially contemporaneous with the arrest, and therefore reasonable under the Fourth Amendment.

The majority of the courts of appeals that have dealt with the problem support this view. See *Price v. United States*, 348 F.2d 68 (D.C. Cir. 1965); *United States v. Dento*, 382 F.2d 361, 365–366 (3rd Cir. 1967); *United States v. Powell*, 407 F.2d 582, 585 (4th Cir. 1969); *United States v. Evans*, 385 F.2d 824, 825 (7th Cir. 1967).[3] *Contra: Barnett v. United States*, 384 F.2d 848, 860–861 (5th Cir. 1967); *Colosimo v. Perini*, ___ F.2d ___ (6th Cir. 1969).[4]

The definitive Supreme Court decision in this area is *Preston v. United States*, 376 U.S. 364 (1964). In that case the police arrested three men for vagrancy after receiving a report that the men were "acting suspiciously" because they had spent most of the night seated in a motorcar parked in a business district. The three men were immediately searched for weapons at the scene and then taken to police

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[3] In *Powell*, however, the court also pointed out that the automobile in question was subject to forfeiture under 49 U.S.C. § 782 because it was being used to carry contraband (counterfeit money). *Id.* at 585. This would appear to bring that case under the exception recognized in *Cooper v. California*, 386 U.S. 58 (1967). Moreover, in *Powell*, the court observed that if the reception of the seized articles deprived the defendant of his Fourth Amendment rights, the error was not prejudicial because at the same trial Powell was also convicted of uttering a forged bill, for which he received a concurrent sentence. 407 F.2d at 585.

[4] The force of the *Evans* decision was somewhat undercut by the Seventh Circuit's subsequent decision in *United States v. Harvey*, 397 F.2d 526, 528–529 (7th Cir. 1968).

In *Colosimo*, the Sixth Circuit withdrew from the position it had previously taken in *Irvine v. Bannan*, 346 F.2d 458 (6th Cir. 1965), and *Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1954), that *Preston v. United States*, 376 U.S. 364, could be distinguished on the facts.

headquarters. Subsequently the police towed the car, which had not been searched at the scene of the arrest, to a garage and twice searched it. This search turned up evidence of a planned robbery, for which the trio was convicted. The police acted without a warrant in conducting this search and attempted to justify it on the ground that it was incidental to a lawful arrest. The Court rejected this argument, holding expressly that:

> "Once an accused is under arrest and in custody, then a search [of his automobile] made at another place, without a warrant, is simply not incident to the arrest." *Preston*, at 367.

The *Price*, *Dento*, *Powell* and *Evans* cases cited above were decided after *Preston*. In each, the court sought to distinguish *Preston* because the time interval between arrest and search was shorter than in *Preston;* or because, unlike *Preston*, a search of the vehicle on street was impracticable due to traffic or a gathering crowd; or because, unlike *Preston*, the search was related to the charge upon which the arrest was made; or because the accused was present when the search was made at the police station. In *Barnett* and *Colosimo*, *Preston* was held to be applicable despite factual differences of this kind.

Appellee attempts the same kinds of distinction between the facts of the instant case and those of *Preston*, claiming, for example, that the time lag and distance involved here were much less. However, reading the *Preston* precedent literally, as this court has consistently done in the past, we do not believe such distinctions are valid. See *Pasterchik v. United States*, 400 F.2d 696, 699 (9th Cir. 1968); *Schoepflin v. United States*, 391 F.2d 390, 393 (9th Cir. 1968); *Lucero v. Donovan*, 354 F.2d 16, 20 (9th Cir. 1965). The above-quoted language from the *Preston* decision is in such categorical form that any disposition to relax the application of the rule announced there should appropriately come first from the Supreme Court.

The Supreme Court has not indicated approval of any such dilution of the *Preston* holding, but has, in fact, recently made it clear that *Preston* is to be stringently applied. Late last term in *Chimel v. California*, 395 U.S. 752 (1969), the Court emphasized the continued breadth and vitality of the *Preston* holding that an incidental search must be conducted at the same time and place as the arrest. There the Court cited *Preston* as authority for a sharp curtailment of the permissible scope of a warrantless search of a home conducted pursuant to a lawful arrest. The Court quoted with approval the following language from *Preston:*

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which

might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." 395 U.S. at 764, quoting from 376 U.S. at 367.

In very similar language *Chimel* holds that a warrantless search of a residence, incident to a lawful arrest, may not go beyond the person of the accused "and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." 395 U.S. at 768. However, we do not here rely on the *Chimel* holding as such because the rule of *Chimel* does not apply to searches conducted before June 23, 1968, the date of the *Chimel* decision.[6] Our holding here rests directly on *Preston*, forcefully adhered to in *Chimel*.

In the only other court of appeals case decided since *Chimel*, this same view concerning the significance of *Chimel* in construing *Preston* has been expressed. We refer to *Colosimo v. Perini*, decided by the Sixth Circuit on September 17, 1969.[7]

The "justifications" for a warrantless search found absent in

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[6]The question of the retroactivity of *Chimel* was expressly left open by the Supreme Court in *Von Cleef v. New Jersey*, 395 U.S. 814, 815 (1969) and *Shipley v. California*, 395 U.S. 818, 819 (1969), and by this circuit in *Jordan v. United States*, ___ F.2d ___ (9th Cir. 1969), decided September 15, 1969. However, in *Williams v. United States*, ___ F.2d ___ (9th Cir. 1969), decided October 17, 1969, we held *Chimel* to be applicable only as to searches made on or after June 23, 1969.

[7]In *Colosimo*, the Sixth Circuit said:

"We are now of the view, however, that since we made those decisions, and since the District Judge's ruling here, further illumination of the *Preston* decision by the Supreme Court in *Chimel v. California*, 395 U.S. 752 (1969), requires a different result. In a case as this where there was sufficient opportunity to procure a search warrant after the defendant was arrested and taken to the police station and while the automobile to be searched remained in police custody, the search of an automobile without a warrant, away from defendant's person, cannot stand Fourth Amendment attack.

"With the person, or persons, suspected of crime and the automobile to be searched both in police custody, the precipitous action of a warrantless search is no longer justified. It is true that in *Preston* the vehicle was searched at a point away from the scene of arrest, while here the vehicle remained at the place where the defendant was arrested. *Chimel*, however, persuades us that such factual distinction is not of controlling importance. We believe that *Chimel* instructs us that the rule of *Preston*, decided prior to the trial here involved, is the law that controls this case. Therefore, we need not consider whether *Chimel* is to be given retrospective effect. The evidence seized should have been suppressed."

Preston were similarly lacking here. When the search of Heffley's automobile was made at the police station, Heffley was not in the vehicle nor in its immediate vicinity. He was in another part of the building in police custody. At that time he had no power to obtain from the interior of the automobile either a weapon or something that could have been used as evidence against him. This is the critical fact. The circumstances that the search was conducted shortly after the arrest, and that it was impracticable to search the automobile on the street, are immaterial. It was practicable for police officers to obtain a search warrant before making the search. The automobile, after being removed to the police station, was in no danger of being ransacked or moved without police approval.[8]

Under *Preston*, read in the light of *Chimel*, the warrantless search of Heffley's automobile at the station was in violation of the Fourth Amendment.[9] Accordingly, the introduction at the burglary trial of the documents seized as a result of that search deprived him of his rights under the Fourth and Fourteenth Amendments, *Mapp v. Ohio*, 367 U.S. 632 (1961), and entitled him to habeas relief.

Heffley also alleged in his habeas application that the prosecution's introduction of incriminating statements made by Heffley while in

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[8] The Nevada Supreme Court upheld the search of Heffley's car at the police station on the theory that it was meant solely to inventory Heffley's belongings for safekeeping. Since the court did not view Santich's actions as an exploratory search, there was no need to decide whether it was incident to a lawful arrest. *Heffley v. State*, 83 Nev. ___, 423 P.2d 666 (1967). In this habeas proceeding the district court declined to adopt this theory and, on this appeal, the warden does not defend the search on that ground. Whatever merit there may be to an "inventory" exception to the general search warrant requirement, the undisputed evidence here demonstrates that the purpose of the search of Heffley's automobile was exploratory. There is no other reasonable explanation for Officer Santich's search "under the hood, wheels, and everything," as he testified.

[9] To be distinguished are cases in which the automobile is or may be held as contraband, *Cooper v. United States*, 386 U.S. 58 (1967); *United States v. Powell*, 407 F.2d 582 (4th Cir. 1969); where a stolen automobile is being held for the rightful owner, *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968); or where articles are discovered while police are taking measures to protect an automobile after the occupant has been arrested, *Harris v. United States*, 390 U.S. 234 (1968).

It should also be clear from the foregoing discussion that we are not here concerned with the search of an automobile under circumstances where it is not practicable to secure a warrant because the vehicle or its contents can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. The continued validity of this distinction was made clear in *Chimel*, footnote 9, and in *Call v. United States*, ___ F.2d ___ (9th Cir. 1969), decided October 27, 1969. In the latter case a warrantless search of a duffel bag found on the tailgate of a parked station wagon was upheld because the bag "could have been quickly moved."

police custody violated his constitutional rights, because such statements were obtained through the use of the illegally-seized documents referred to above. The district court did not reach this question since it held that the documents were not illegally seized. This is a matter to be explored in the further proceedings that may follow this opinion.

In his reply brief on this appeal, Heffley argues for the first time that his arrest was illegal because it was not pursuant to a warrant nor based upon probable cause. Apart from the untimeliness of this point, it is moot. The legality of the arrest would be material only with regard to the lawfulness of the search and seizure. Since we have already held that the search and seizure was unlawful, Heffley will not benefit further from a holding that the arrest was also illegal.

The judgment is reversed and the cause is remanded with directions to allow the state a reasonable time within which to retry Heffley on the burglary charge, failing which the district court shall issue a writ of habeas corpus.

POWELL, District Judge, (Dissenting)

I would affirm and hold that the seizure of the incriminating documents falls within the rule announced in *Harris v. United States*, 390 U.S. 234, 236 (1968), where the Court held:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker v. California*, 374 U.S. 23, 42–43 (1963); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924)."

In *Harris*, an officer was examining the defendant's car for the purpose of removing any valuables. When he opened the door to the vehicle he viewed a registration certificate. The document was seized and used to incriminate the defendant at trial. The examination was conducted pursuant to a police regulation, and as in the instant case, the evidence was seized without a warrant and while the defendant was incarcerated in the station house.

Defendant Heffley was arrested for illegal possession of a gun. At the scene of arrest the officers viewed, in bulk, the following items lying in the back portion of the vehicle: six shotguns, two rifles, two pistols, four cameras, field glasses, a timing light and various papers. The documents in issue were either underneath the weapons or lying

next to them.[1] When Heffley's vehicle was later taken to the police station Officer Santich seized the weapons and the documents.

Assuming the two passports and the two certificates of registration were not visible from outside the vehicle, it does not follow that they could not be seized by the officer once he was lawfully in the vehicle. As in *Harris*, if the officer's presence in the car is lawful, he can seize evidentiary items falling into view at that time. In this case, Officer Santich's presence in the vehicle was the result of the view of the weapons he had at the scene of arrest, and therefore lawful.

The majority opinion is correct in stating "• • • [t]he 'narrow circumstances' of *Harris* are not present here." *Majority Opinion* supra p. 4. In *Harris*, the officer did not have a view of any incriminating objects before he entered the vehicle. The entrance there was justified under a police regulation. In this case the officer had the view *before* he entered the vehicle, and, as Harris clearly holds, those objects so viewed were subject to immediate seizure. Therefore I cannot agree that the officer in Sacramento had no right to enter and remove the guns or that he was required to get a search warrant to seize additional objects he saw once he was within the vehicle.

Adopting the reasoning of the majority opinion based on *Pendleton v. Nelson*, 404 F.2d 1074, 1077 (9th Cir. 1968), the officer in *Harris*, could not have seized the incriminating documents without first obtaining a warrant. His seizure would be unreasonable since no exigent circumstances existed justifying a warrantless seizure.

Such reasoning does violence to the *Harris* opinion, and the premise upon which the United States Constitution should be interpreted "There is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

Decisions involving facts similar to those before us have sustained the validity of the seizure without a warrant. See e.g., *Leffler v. United States*, 409 F.2d 44, 50 (8th Cir. 1969); *Creighton v. United States*, 406 F.2d 651, 652 (D.C. 1968); *People v. Harris*, 64 Cal.Rptr. 313, 434 P.2d 609 (1968). *Cf. United States v. Riso*, 405 F.2d 134 (7th Cir. 1968), cert. denied 394 U.S. 959 (1969). Nor is a warrant

[1] The "record" supports the findings of the district court below that "• • • Most of the articles seized were in plain view in the rear portion of the sedan, and the evidentiary items essential to the Nevada prosecution were there found, although they may have been covered or obscured by the guns and other paraphernalia." (Emphasis added.) Record at 117.

required under authority of *Harris*, supra, to inspect evidence in possession of police. *Westover v. United States*, 394 F.2d 164, 165 (9th Cir. 1968).

There is no argument with the proposition that the officers could have seized the items at the scene of arrest—regardless of the feasibility of obtaining a warrant.

> "The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest, * * *." *Ker v. California*, 374 U.S. 23, 41 (1963).

Instead, the officers drove the vehicle three blocks from the scene of arrest and there immediately seized the incriminating documents. If exigent circumstances were required it would seem that the public safety factor resulting from police procedures utilized in this case suffice. The officers here should be commended not condemned.

I would also affirm on other grounds. The seizure here was not "* * * remote in time or place from the arrest." *Preston v. United States*, 376 U.S. 364, 367 (1964). Under the circumstances present here the availability of warrant process is not determinative. *Ker v. California*, supra.

The majority opinion places this Circuit in the minority of the jurisdictions which have decided this question. *Majority Opinion* supra p. 4. This position is not heretofore reflected by our previous holdings. *Pasterchik v. United States*, 400 F.2d 696 (9th Cir. 1968) (evidence suppressed where some four hours after accused was arrested F.B.I. agents went to his home and searched his car located in the garage). *Schuepflin v. United States*, 391 F.2d 390 (9th Cir.), cert. denied 393 U.S. 865 (1968), (search held violative of *Preston*, supra, where F.B.I. agent was called into case and searched accused's car at police garage some two hours after arrest). *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965) (evidence suppressed where accused was picked up on the street, driven to his place of residence, and residence searched). In each of the above cases the location of the search was either distant from the place of arrest or the lapse of time from arrest to search exceeded two or more hours.

The majority would find support in *Chimel v. California*, 395 U.S. 752 (1969)[1] notwithstanding this Circuit's recent decision limiting *Chimel* to prospective application. *Williams, et al. v. United States*,

[1] Hoffler's car was stopped on a three lane one way street. Cars were backed up behind the scene of arrest and were forced around in order to resume their travel. (Record at 33 and 36). See *Morris v. Beardon*, 386 F.2d 395 (4th Cir. 1967), cert. denied 390 U.S. 1043 (1968), where the needs of crowd control and protection of the prisoner warranted removal of the car and a subsequent search.

(9th Cir. Decided Oct. 17, 1969). In so doing law enforcement officials are held to a standard in 1965, announced in 1969. The arrest and search in this case occurred on November 13, 1965.

I do not find a reference in the *Chimel* opinion that indicates *Preston* is to be "stringently" applied as the majority states. On the contrary that opinion specifically excludes certain automobile searches.[3] *Preston* is cited as authority in *Chimel* but the Supreme Court has not enlarged that holding even though opportunity to do so has existed.[4]

This Court should favor the reasoning of the Eighth Circuit in *Leffler v. United States* supra, where Judge Mehaffy, writing in a case similar to this one, says:

> "• • • We must bear in mind that the Fourth Amendment denounces only unreasonable searches and seizures, and if the criminal laws of this country are to be enforced and law-abiding citizens protected care should be taken not to place a doctrinaire or hypertechnical interpretation upon the plain and simple language of the Constitution in our zeal to protect the rights of those charged with crimes." *Leffler v. United States*, 409 F.2d 44, 49 (8th Cir. 1969).

I would affirm.

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[3] 395 U.S. at 764 fn 9.

[4] See e.g., *Cooper v. California*, 386 U.S. 58, 62; 65 (1967) (dissent).